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12   UNITED STATES DISTRICT COURT

13   NORTHERN DISTRICT OF CALIFORNIA

14   SAN FRANCISCO DIVISION

15

16 SUN MICROSYSTEMS, INC.   CASE NO. C-07-05488-EDL

17   Plaintiff-Counterclaim Defendant,   **JOINT REPORT REGARDING 14
                                              PROPOSED TERMS FOR CLAIM
18   v.   CONSTRUCTION**

19 NETWORK APPLIANCE, INC.

20   Defendant-Counterclaim Plaintiff.

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            Pursuant to the Court's July 25, 2008, Order Following Case Management Conference,
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    NetApp, Inc. ("NetApp") and Sun Microsystems, Inc. ("Sun") jointly submit this Joint Report
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    Regarding 14 Proposed Terms for Claim Construction.[1] Additionally, pursuant to the Court's
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    Order directing the parties to narrow the number of patents-in-suit to four NetApp patents and
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    five Sun patents, the parties have each identified their respective patents. The NetApp patents for
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    the first wave of this case are United States Patent Nos. 6,574,591, 6,868,417, 7,107,385 and
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28 _____
    [1] The Court had requested the parties to submit fifteen priority terms. Because there is no overlap of terms between
    the parties, the parties agreed to submit an even number of terms.

7,313,720. The Sun patents for the first wave of this case are United States Patent Nos.

5,124,987, 5,430,855, 6,421,787, 5,632,012 and 5,721,937.

In addition to the fourteen terms submitted herewith, the parties note that there are other

continuing claim construction disputes concerning the first wave of patents. For example, for

each of Sun's five patents and NetApp's four patents, there is at least one disputed claim term that

is not included in this Report. In addition the parties dispute the function and/or corresponding

structure for a number of means-plus-function terms in the patents-in-suit. The parties believe

that the Court may need to address additional claim construction disputes before infringement

claims concerning the nine patents in the first wave can proceed through summary judgment or

trial.

Below please find the parties' list of fourteen terms, in order of priority.

No.	Term	Party Which Proffers Term	Patent	Statement Of Why Term Needs Construction
1.	"virtual disk(s)/ vdisk(s)"	Sun	United States Patent No. 7,107,385	If Sun's proposed construction is adopted, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims. The accused products do not include this limitation. For example, and without limitation, the accused instrumentality (ZFS) does not maintain a storage object within a file system encapsulated as a lun inode pointing to at least one stream inode that is managed as a regular file emulating a physical disk.
2.	"first available memory space"	NetApp	'987 patent	As used in the claims, this term requires that data can only be written to a logical track (i.e., "memory space") that is entirely

				empty. The accused products can and do write to logical tracks that already contain data. As a result, if the Court adopts NetApp's construction, NetApp expects there will be a strong likelihood of summary judgment of non-infringement as to all accused products.
3.	"increas[ed/ing] a number of persistent consistency point images"	Sun	United States Patent No. 7,313,720	This phrase is indefinite under section 112, ¶ 2 because it is unclear and fails to set forth the subject matter which applicants regard as their invention. Because this phrase is in all of the asserted independent claims, all asserted claims are invalid.
4.	"means responsive to said reading of said memory controller for periodically verifying the integrity of data currently stored in each of said identified dedicated partitions"	NetApp	'012 patent	As used in the claims, this term requires a structure that runs the disk scrubbing process only on partitions that have been pre-selected as "dedicated partitions" and never on partitions that are "free." The accused products contain no structure that runs a scrubbing process only on partitions that have been pre-selected as "dedicated partitions." If the Court adopts NetApp's construction, NetApp expects there will be a strong likelihood of summary judgment of non-infringement as to all accused products.
5.	"mode operations"/"mode layer operations"	Sun	United States Patent No. 6,868,417	These phrases are indefinite under section 112, ¶ 2 because it is unclear and fails to set forth the subject matter which applicants regard as their invention. Because this phrase is in the one asserted independent claim, all asserted claims are invalid.

				Even if the Court should determine that the claims are not indefinite and instead adopts Sun's alternate construction, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims. The accused products do not include this limitation. For example, and without limitation, the accused instrumentalities do not include operations on inodes, where an inode is a data structure that points to the data blocks of a file and contains status information about the file.
6.	active link between said active nodes	NetApp	'787 patent	As used in the claims, this term requires that each network link have at least two pertinent characteristics: a) they must have either a point-to-point or multi-drop configuration, and b) they must be node-to-node, rather than node-to-disks. However, the network links in NetApp's products do not have these characteristics, because they use separate switches. If the Court adopts NetApp's proposed construction, NetApp expects there will be a strong likelihood of partial summary judgment of non-infringement as to all products.
7.	"file system information (fsinfo) block"	Sun	United States Patent No. 7,313,720	If Sun's proposed construction is adopted, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims. The accused products do not include this limitation. For example, and without limitation, the accused instrumentality

8.	means, responsive to the receipt of a stream of data records from said associated data processor, for writing said received stream of data records in available memory space in one of said disk drives	NetApp	'855 patent	As used in the claims, this term requires a structure that responds to the receipt of a stream of data records by writing that stream of data records in a single disk drive. The accused products contain no structure that would require a stream of data records to be stored on a single disk drive. If the Court adopts NetApp's construction, NetApp expects there will be a strong likelihood of summary judgment of non-infringement as to all accused products.
9.	"storage layer underlying the block and file level servers"	Sun	United States Patent No. 6,868,417	If Sun's proposed construction is adopted, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims. The accused products do not include this limitation. For example, and without limitation, the accused instrumentality (ZFS) does not include a storage layer that is the software level immediately below and coupled to block and file level servers and above the management layer.
10.	means for reading data in each of said identified dedicated partitions	NetApp	'012 patent	As used in the claims, this term requires a structure that reads data to commence a scrubbing process only in those partitions that have been previously identified as "dedicated". The accused products contain no

The first row (continued from previous page):

(ZFS) does not maintain a block located at a fixed location on disk describing the volume, including the size of the volume, volume level options and language.

				structure that reads data only from partitions that have been previously identified as "dedicated." If the Court adopts NetApp's construction, NetApp expects there will be a strong likelihood of summary judgment of non-infringement as to all accused products.
11.	"swizzl[e/ing] said BN pointers"	Sun	United States Patent No. 6,574,591	If Sun's proposed construction is adopted, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims. The accused products do not include this limitation. For example, without limitation, the accused instrumentality (ZFS) does not transfer storage blocks and does not remap old BN pointers in storage blocks transferred in the image stream to new BN pointers.
12.	first available one of said logical tracks	NetApp	'987 patent	As used in the claims, this term requires that data can only be written to a logical track that is entirely empty. The accused products can and do write to logical tracks that already contain data. As a result, if the Court adopts NetApp's construction, NetApp expects there will be a strong likelihood of summary judgment of non-infringement as to all accused products.
13.	"performs identical data management operations upon the underlying block level and file level data"	Sun	United States Patent No. 6,868,417	If Sun's proposed construction is adopted, Sun intends to file a motion for summary judgment of non-infringement as to all asserted claims,. The accused products do not

				include this limitation. For example, and without limitation, the accused instrumentality (ZFS) does not provide each and every data management operation that is performed on block level data is performed on file level data and each and every data management operation that is performed on file level data is performed on block level data.
14.	communication link	NetApp	'787 patent	As used in the claims, this term requires either a point-to-point link or a multi-drop link. NetApp's products use separate switches. If the Court adopts NetApp's proposed construction, NetApp expects there will be a strong likelihood of partial summary judgment of non-infringement as to all products.

Dated: August 7, 2008

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JOINT REPORT RE: 15 PROPOSED TERMS FOR CLAIM CONSTRUCTION –
USDC CASE NO. C-07-05488 EDL